IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0115

IN THE MATTER OF:

C.A.D. III,

A Youth in Need of Care.

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable C.B. McNeil, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

STATEMENT OF THE ISSUES

1. J.K.'s constitutional right to parent was violated when the Department removed her child in violation of Montana law.

2. The district court erred in concluding that the State met the statutory criteria to terminate mother's parental rights.

STATEMENT OF THE CASE

Appellant J.K. is the biological mother of C.A.D. III. C.A.D. Jr. is the biological father of C.A.D. III. The parental rights of C.A.D. Jr. were terminated on December 14, 2009. (D.C. Doc. 82.) J.K.'s parental rights were terminated on February 10, 2010. (D.C. Doc. 105.) J.K. appeals from the termination of her parental rights and has filed a timely notice of appeal.

STATEMENT OF FACTS

The Department of Child and Family Services ("Department") originally became involved when it received a report that the mother, J.K., who was 16 at the time, did not know how to care for her infant son, C.A.D. III. (D.C. Doc. 41 at 2.) J.K. received parenting classes and services from the Department in an effort to learn to appropriately care for her son. (D.C. Doc. 41 at 2.) Unfortunately, the Department again became involved when they received reports of domestic violence between J.K. and C.A.D. Jr. (D.C. Doc. 28 at 3.) J.K. signed a voluntary protective services agreement with the Department, consenting to live with her

brother for thirty days. (D.C. Doc. 28 at 3.) After reconsideration, J.K. and the baby returned to live with C.A.D. Jr. (D. C. Doc. 28 at 4.) When the Department learned of this, they insisted J.K. send C.A.D. III to live with his grandmother. (D.C. Doc. 28 at 4.) J.K. agreed, but brought the child home soon after. (D.C. Doc. 28 at 4.)

The Department reacted by removing C.A.D. III from the home the next day, July 18, 2008. (D.C. Doc. 1 at 3.) At the time, both parents were away on a camping trip and the baby was in the care of his grandmother and uncle. (D.C. Doc. 1 at 3.) A week after the removal, the Department filed a Petition for Temporary Investigative Authority and Emergency Protective Services. (D.C. Doc. 1.)

C.A.D. Jr. moved to dismiss the petition and the order granting the Department temporary investigative authority. (D.C. Doc. 10.) J.K. joined in the motion[1] and a hearing was held on September 3, 2008. (D.C. Doc. 20 at 22.)

At the hearing, the child's grandmother, uncle, and the uncle's girlfriend all testified that when C.A.D. III was removed there was no emergency or immediate

[1] J.K. joined in C.A.D. Jr.'s Motion to Dismiss on September 2, 2008. (D.C. Doc. 20.) At the hearing, Judge McNeil stated that J.K. had only joined the motion to dismiss as to the father, not the mother. (9/3/08 Tr. at 51.) This does not make logical sense as the motion was to dismiss the Order Granting Protective Services, i.e., the entire proceeding as to C.A.D. III. As the facts concerning the emergency removal are substantially similar for J.K. and for C.A.D. Jr., J.K. has the same right to appeal the district court's denial of the motion to dismiss.

risk of harm. (9/3/08 Tr. at 27, 30, 32.) In fact, C.A.D. III had just awoken from a nap and was having a snack when Department worker Alice Phelan ("Phelan") and Family Concepts worker Cynthia Hunter ("Hunter") arrived to remove him. (9/3/08 Tr. at 26.) Hunter admitted that while there were previous concerns about the family, there was no emergency at the time of removal. (9/3/08 Tr. at 67, 69.)

The State's evidence consisted of Phelan's previous concerns and testimony by Theresa Neely ("Neely"), an acquaintance of both J.K. and C.A.D. Jr. (9/3/08 Tr. at 70.) Over hearsay objections by C.A.D. Jr.'s counsel, Neely testified that J.K. had disclosed to her two arguments between she and C.A.D. Jr.; one in which C.A.D. Jr. put the baby in his truck without a car seat and another where J.K. exited his car with the baby in her arms even though the car was still moving. (9/3/08 Tr. at 72, 74, 79.) C.A.D. Jr. denied the allegations. (9/3/08 Tr. at 79.) While J.K. was present at the hearing, she was not called to testify. (9/3/08 Tr. at 4.)

The district court denied the motion to dismiss and issued Findings of Facts and Conclusions of Law, concluding that it "was reasonable for the Department to suspect that youth was in immediate or apparent danger once it learned that the child had been returned to his parents." (D.C. Doc. 28.) The district court adopted the Department's proposed Findings of Facts and Conclusions of Law word for word, merely crossing out the Department's heading and adding its own signature

block. (D.C. Doc. 28.) C.A.D. Jr. appealed the district court's denial. (D.C. Doc. 31.) C.A.D. III continued in out-of-home placement while proceedings were stayed for several months pending the outcome of the appeal of the father's motion to dismiss. (D.C. Docs. 46-47.)

In the meantime, J.K. consented to temporary investigative authority and protective services, agreeing to several conditions. (D.C. Doc. 39 at 2.) By January 2009, J.K. had partially completed several of the assigned tasks. (D.C. Doc. 41 at 4-5.) Most notably, the THC levels in her urinary analysis tests had fallen from 297 to negative and she was working on completing parenting classes. (D.C. Doc. 41 at 5-6.) Despite her progress, the State petitioned for an adjudication of youth in need of care on January 16, 2009. (D.C. Doc. 40.) On February 3, 2009, this Court declined to hear the denial of motion to dismiss issue on the basis that the order was not final.

An adjudicatory hearing on the youth in need of care petition was held on March 11, 2009. (D.C. Doc. 51.) Once again Phelan and Hunter focused primarily on C.A.D. Jr.'s marijuana use and the report of domestic violence from six months prior as the reasons C.A.D. III was at risk of abuse and neglect. (3/11/09 Tr. at 47-48; D.C. Doc. 41 at 7.) The district court relied on Phelan's old report in concluding that "the parents' continued use of illegal drugs and the presence of domestic violence in the home," were sufficient to adjudicate C.A.D. III a youth in

need of care and continue the Department's temporary legal custody. (D.C. Doc. 52 at 4.)

J.K. consented to a treatment plan scheduled to begin on April 29, 2009, and to be completed by August 1, 2009. (D.C. Docs. 56, 59.) The first objective was to complete a psychological evaluation and parenting assessment with Dr. Paul Silverman ("Silverman"). (D.C. Doc. 59 at 2.) The recommendations from those reports were needed to address the other objectives in the plan. (D.C. Doc. 59 at 2.) Unfortunately, Silverman's report was not disseminated until June 2009, one month before the plan expired. (2/5/10 Tr. at 38.) Approximately one month after the treatment plan's August 1 completion date, the State filed a petition to terminate J.K.'s parental rights, citing J.K.'s failed treatment plan. (D.C. Doc. 60.) C.A.D. Jr.'s, parental rights were terminated on December 14, 2009, and J.K. proceeded to the termination hearing on February 5, 2010. (D.C. Doc. 82; 2/5/10 Tr.)

Silverman testified that his general impression of J.K. was "an immature adolescent." (2/5/10 Tr. at 5.) He was concerned about her "relatively few insights about [her] child," and noted J.K.'s difficulty in implementing concepts. (2/5/10 Tr. at 44-45.) To address this, he recommended "hands on" instruction and admission into a therapeutic setting such as the Carol Graham Home. (2/5/10 Tr. at 44-45.)

Department worker Jake Leeper ("Leeper") admitted that although the Carol Graham Home was recommended, that service was never provided. (2/5/10 Tr. at 160.) Additionally, even though he acknowledged J.K.'s need for hands-on training, Leeper was not sure how she was instructed, he could only "assume." (2/5/10 Tr. at 162.) J.K.'s testimony confirmed that she was never informed of the need or availability of the Carol Graham Home, a therapeutic setting for her to learn, much more suited to her abilities. (2/5/10 Tr. at 208.) Once she learned of its existence, however, she applied. (2/5/10 Tr. at 208.) Contrary to Leeper's assumption, J.K. testified that there very little, if any, "hands on" application of parenting skills and that Family Concepts Representative Cynthia Hunter ("Hunter") never provided feedback during visitations. (2/5/10 Tr. at 212.) Additional testimony provided that J.K. was actively participating in counseling, had been sober for nearly a year, had attended most visitations, completed parenting classes, digested a large amount of educational material on parenting, nearly completed her GED, signed releases, and maintained a clean, adequate home for her baby. (2/5/10 Tr. at 75, 158, 168, 170, 202, 214-15, 217-19.)

Despite J.K.'s efforts and in spite of the delayed release of Silverman's evaluation recommendations, another treatment plan was not offered. Instead, the district court permanently terminated J.K.'s fundamental right to raise her son. She filed a timely notice of appeal.

SUMMARY OF THE ARGUMENT

The Department exceeded the scope of its statutory authority when it removed C.A.D. III when no immediate or apparent danger existed. The removal violated J.K.'s fundamental rights and precipitated a chain of events that ultimately led to the termination of her parental rights. The district court erred when it denied the motion to dismiss based upon the illegal removal. The findings of fact upon which the district court based its denial and the adjudication of C.A.D. III as a youth in need of care are insufficient and are not supported by sufficient evidence in the record. Additionally, the district court failed to apply the statutory criteria for termination. First, it erred in concluding that the Department provided J.K. an appropriate treatment plan. Recommended services were not provided, the plan failed to meet the specific needs of J.K. and her son, and it lacked reasonable timelines. Also, the district court failed to apply the Mont. Code Ann. § 41-3-609(2) factors and failed to make specific findings that J.K.'s conduct or condition rendering her unfit was unlikely to change within a reasonable time. The findings the court did make were not supported by the record. Given the district court's erroneous conclusions of law and insufficient factual findings, it abused its discretion in terminating J.K.'s parental rights.

STANDARD OF REVIEW

A parent's right to the care and custody of a child is a fundamental liberty interest and must be protected by fundamentally fair procedures. *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 168 P.3d 629, *In re V.F.A.*, 2005 MT 76, ¶ 6, 326 Mont. 383, 109 P.3d 749. The Supreme Court reviews constitutional issues of due process as a question of law and is plenary. *In re A.R.*, 2004 MT 22, ¶ 8, 319 Mont. 340, 83 P.3d 1287, *In re the Mental Health of K.G.F.*, 2001 MT 140, ¶ 17, 306 Mont. 1, 29 P.3d 485.

A district court's denial of a motion to dismiss in an abuse and neglect proceeding represents a conclusion of law. *In re D.B. and D.B.*, 2008 MT 272, ¶ 12, 345 Mont. 225, 190 P.3d 1072. The Court reviews all conclusions of law to determine if the district court correctly interpreted and applied the law. *In re D.B.*, ¶ 12.

Dependent/neglect cases require the district court to make specific findings. This Court reviews whether the State has established the statutory criteria for termination to determine whether the district court's findings of fact are clearly erroneous and whether the conclusions of law regarding the statutory provisions are correct. *In re D.F.*, 2007 MT 147, ¶ 21, 337 Mont. 461, 161 P.3d 825. A factual finding is clearly erroneous if "it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence underlying the finding,

or if a review of the record leaves this Court with a definite and firm conviction that a mistake has been made." *In re D.F.*, ¶ 21.

Once a district court has determined that the State has met the statutory criteria for termination, the district court must then use its discretion to decide whether it should or should not terminate parental rights. *See* Mont. Code Ann. § 41-3-609(1) providing that upon establishment of the statutory criteria, "the court *may* order a termination" (emphasis added). The discretionary termination decision is reviewed by the appellate court for an abuse of discretion. *In the Matter of T.L. and K.L.*, 2005 MT 256, ¶ 8, 329 Mont. 58, 122 P.3d 453. The district court has abused its discretion if it "acts arbitrarily, without employing conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *In The Matter of the Custody and Parental Rights of A.P.*, 2007 MT 297, ¶ 28, 340 Mont. 39, 172 P.3d 105. If the record contains a "mistake of law or a finding of fact not supported by substantial evidence," the district court necessarily abused its discretion. *In re J.C.*, 2003 MT 369, ¶ 7, 319 Mont. 112, 82 P.3d 900.

ARGUMENT

I. J.K.'S CONSTITUTIONAL RIGHT TO PARENT WAS VIOLATED WHEN THE DEPARTMENT REMOVED HER CHILD IN VIOLATION OF MONTANA LAW.

The United States Constitution guarantees certain fundamental rights, among these is the fundamental right to care and custody of one's children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). In *Pierce*, the U.S. Supreme Court held that the "liberty of parents and guardians includes the right to direct the upbringing and education of children under their control." The Court explained that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535.

In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court again confirmed the constitutional right of parents to direct the upbringing of their children by stating that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, 321 U.S. at 166; *see also*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("the parent-child relationship is an important interest that undeniably warrants deference and, absent a powerful countervailing

interest, protection."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Santosky v. Kramer*, 455 U.S. 745 (1982)).

Montana has long recognized that "a natural parent's right to care . . . of a child is a fundamental liberty interest, which must be protected." *In re B.N.Y.*, 2006 MT 34, ¶ 16, 331 Mont. 145, 130 P.2d 594. Accordingly, there must be "fundamentally fair procedures" to protect parent's constitutional liberty interest in parenting their child. *See e.g.*, *In re K.J.B.*, ¶ 41; *In re A.J.E.*, 2006 MT 41, ¶ 21, 331 Mont. 198, 130 P.3d 612; *In re T.H.*, 2005 MT 237, ¶ 21, 328 Mont. 428, 121 P.3d 541; *In re V.F.A.*, ¶ 6.

It is under this backdrop of constitutional protections that the Department must operate, while balancing the need to protect children from unnecessary harm.

A. The Department Incorrectly Invoked the Emergency Protective Services Provisions of Mont. Code Ann. § 41-3-301.

Montana law allows child protection workers who believe a child "is in immediate or apparent danger of harm [to] immediately remove the youth and place the youth in a protective facility." Mont. Code Ann. § 41-3-301 (2009).

Accordingly, the Child and Family Services Policy Manual provides examples of when such an emergency removal is appropriate:

> A child left without appropriate supervision when the child is not physically, mentally, socially or emotionally mature; a child who has been physically abused and is need of medical attention; the worker has reason to believe that retaliation to the child will occur; a child

> who appears to be in need of protection, but whose parents are likely to take the child and flee protective services authority; a child who has been physically or sexually assaulted and the child is not safe in the home; or a child is in danger because of the occurrence of partner or family member assault.

Child and Family Services Policy Manual: Legal Procedure, Immediate Protection and Emergency Protective Services, Section 302-1.

While Montana case law has not defined "immediate and apparent danger of harm," Black's Law Dictionary provides some guidance. "Apparent danger" is defined as "obvious danger; real danger." "Immediate" is defined as "1. Occurring without delay; instant. 2. Not separated by other persons or things. 3. Having a direct impact; without an intervening agency." Black's Law Dictionary 175, 338 (Bryan A. Garner ed., 3d Pocket ed., West 2006).

Additionally, Ninth Circuit case law is persuasive. In *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007), the court found that an eighteen day delay in investigating allegations of severe harm negated the department's claim of immediacy needed for an emergency removal. *Rogers*, 487 F.3d at 1296. The initial report, on August 20, alleged that the children were not potty trained and still feeding from a bottle, locked in their bedrooms at night and at times during the day, not receiving adequate medical or dental care, resulting in severe bottle-rot and an environment that was dirty, maggot infested, and contained unsecured guns. *Rogers*, 487 F.3d at 1291. The social worker did not go to the home to investigate

until September 7. Given the eighteen day period separating the report and investigation, the court concluded that no exigency existed. *Rogers*, 487 F.3d at 1296; *see also*, *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999) (holding that a 14-day delay by social workers in entering the family home to investigate a report of abuse is evidence of lack of exigency).

While the *Rogers* court recognized the seriousness of child abuse and neglect, it also recognized the rights of families:

> Child abuse and neglect are very serious problems. We applaud the efforts of social workers to address these matters and to protect the vulnerable victims of these crimes. "No one can doubt the importance of this goal." *Cf. Mincey v. Arizona*, 437 U.S. 385, 393 (1978).
>
> However, the rights of families to be free from governmental interference and arbitrary state action are also important. Thus, we must balance, on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution.

Rogers, 487 F.3d at 1298.

At its most basic level, immediate and apparent danger is danger that will nearly instantly occur absent some intervening force. Due to its inherent exigency, immediate and apparent danger is markedly different from the risk of abuse or neglect. In the present case, each of the adults present when C.A.D. III was removed testified that there was no "emergency" that required C.A.D. III's immediate removal. (9/3/08 Tr. at 27, 30, 32.) To the contrary, Department

worker Phelan arrived at the home only to find C.A.D. III happily snacking on a peanut butter and jelly sandwich in the care of his grandmother and uncle. (9/3/08 Tr. at 26.) Any risk of abuse or neglect that was alleged to exist could have been addressed without immediate removal. The Department could have applied to the district court for temporary investigative authority consistent with the statute. Instead, the Department removed the child, then filed the petition a week later. (D.C. Doc. 1.) In effectuating an emergency removal, in light of the non-emergency situation, the Department failed to balance the need to protect children and preserve the fundamental liberty interest of J.K.

B. The District Court's Order Denying J.K.'s Motion to Dismiss Is Legally Insufficient and Not Supported by Substantial Evidence.

In dependent/neglect cases, the district court must strictly follow the statutory guidelines and make "*specific* statutory findings required by § 41-3-609." *In re D.B.*, ¶ 23 (emphasis added). Those findings are reviewed by this Court to determine if they are clearly erroneous. Findings of fact are clearly erroneous if they are not support by substantial evidence; if the district court misapprehended the effect of the evidence; or, even if substantial evidence exists and the effect of the evidence has not been misapprehended, if this Court is left with a definite and firm conviction that the district court made a mistake. *In re M.W. and C.S.*, 2001 MT 78, ¶ 3, 305 Mont. 80, 23 P.3d 206.

In the instant case, the district court made findings which denied J.K.'s motion to dismiss and supported the position that C.A.D. III was in immediate danger at the time of his removal. (D.C. Doc. 28.) The district court adopted the proposed findings from the Department in total and in doing so relied almost entirely upon Phelan and Neely's testimony concerning incidents alleged to have occurred over a month before C.A.D. III's removal. (D.C. Doc. 28 at 2-4.) Even though the relied upon testimony was given over C.A.D. Jr.'s hearsay objections, some of which were sustained, the court nevertheless relied on those statements in its order. (9/3/08 Tr. at 74.) The district court made no mention of the testimony of C.A.D. Jr. which rebutted the incidents testified to by Phelan and Neely. (9/3/08 Tr. at 79.) Also completely disregarded was the testimony from five witnesses who stated that there was no emergency at the time of C.A.D. III's removal. (9/3/08 Tr. at 27, 30, 32, 40, 69.)

Most notably, there is no specific finding which identified the immediate or apparent danger to the child at the time of removal on July 18, 2008. Not only does the record not support such a finding, it directly contradicts it. All the witnesses, even Department witnesses Phelan and Hunter, agreed that there was no emergency or immediate or apparent danger of harm at the time of removal. (9/3/08 Tr. at 27, 30, 32, 40, 69.)

This Court has continually urged district courts to strictly follow statutory requirements. *In re K.J.B.*, ¶ 46. ("I note only that we have repeatedly cautioned the State and the district courts to strictly follow the statutes applicable to child abuse and neglect proceedings.") (citing dissent); *see also*, *In re A.R.*, ¶ 23; *Inquiry into M.M.*, 274 Mont. 166, 174, 906 P.2d 675, 680 (1995); *Matter of F.H.*, 266 Mont. 36, 40, 878 P.2d 890, 893 (1994); *Matter of R.B.*, 217 Mont. 99, 105, 703 P.2d 846, 849 (1985). Making specific findings goes hand in hand with that requirement. *In re D.B.*, ¶ 23. The district court here failed to make specific factual findings, and the generic findings it did make were not supported by the record. Therefore, the denial of the motion to dismiss should be reversed.

C. The District Court's Order Adjudicating C.A.D. III a Youth in Need of Care Is Legally Insufficient and Not Supported by Substantial Evidence.

Likewise, the findings of fact for adjudication are not sufficiently specific to support adjudication. Adjudication requires the Department to prove, by a preponderance of the evidence, that the child is a youth in need of care. Mont. Code Ann. § 41-3-437(2). A youth in need of care is a child who has been "abused, neglected or abandoned." Mont. Code Ann. § 41-3-102(34). J.K. argues that the Department did not meet its burden of proof for adjudication, nor are the findings issued by the district court sufficient to support adjudication.

None of the testimony at the adjudicatory hearing identified areas of concern that had not already been presented at the September 3, 2008 hearing. Accordingly, the order adjudicating C.A.D. III a youth in need of care relied upon the same stale and inconsistent facts from months before.

The most specific finding of fact in the district court's order reflects the court's continued reliance on the same piece of information. The court found that:

> The nature of the abuse and neglect, and the facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based are the parent's continued use of illegal drugs and the presence of domestic violence in the home, and as further described in the Affidavit and Report to the Court of Alice Phelan, dated January 14, 2009.

(D.C. Doc. 52 at 3.)

The remaining findings of fact and conclusions of law parrot the statutory language and make no specific reference to the issues of the case. (D.C. Doc. 52.)

Chief Justice Gray indicated in a dissenting opinion the difficulties that such general findings place on parties and this Court to determine if appealable issues exist. *In re D.A.*, 2003 MT 109, ¶ 38, 315 Mont. 340, 68 P.3d 735 (Gray, CJ, dissenting). She questions how such generic findings, coupled with the district court's reliance upon the affidavit of the child protection specialist, can be relied upon by a district court to make a finding of adjudication. *In re D.A.*, ¶ 38. Furthermore, "statements supporting an initiating petition simply are not evidence upon which a trial court can rely in making findings of fact." *In re D.A.*, ¶ 38.

D. The Cumulative Effect of the Department's Non-Emergency Removal of C.A.D. III and the District Court's Insufficient Findings Warrant Reversal of the Parental Termination Order.

The inherent danger in allowing the Department to remove children without clear facts supporting "immediate or apparent danger," and permitting district courts to make vague and general findings supporting removal or adjudication is that no longer does the Department have to justify the removal, but parents have to justify reunification. This is counter-intuitive to the Montana Family Policy Act, which clearly states the policy of the state of Montana as to "support and preserve the family." Mont. Code Ann. § 41-7-102. Most importantly, removal of child, with or without a true emergency situation, starts a moving train that is not easily stopped.

Once removed, judges, child protection workers, guardian ad litems and CASAs are less inclined to recommend returning the child home until it is proven that *all* risk of abuse or neglect is gone. This is not a standard under which any parent should be judged. Moreover, it is commonly held by professionals that the longer a child remains in one custodial arrangement, the more detrimental it becomes to change that arrangement. This creates a compelling argument that the child should remain wherever placed, regardless of the validity of the removal in the first place. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 Fam. Ct. Rev. 540, 544-5

(2004). Each passing day that a child is in the physical custody of someone other than the parent, the argument for reunification is undermined. This is even more problematic when there was no basis for an emergency removal in the first place.

In the instant case, C.A.D. Jr. requested that this Court consider the district court's denial of the motion to dismiss over a year ago, in December 2008. This Court determined that the order denying the motion to dismiss was not an appealable order as it was not final.

In the interim, nearly two years have passed since C.A.D. III was removed from his parents' home and placed in foster care. This Court cannot help but consider the length of time that C.A.D. III has been in his current placement. That consideration should not, however, deter the Court from making a finding that the emergency removal was not supported by facts showing an immediate or apparent danger to C.A.D. III. If the initial action taken by the Department (emergency removal) is not supported by a sufficient showing the in record, the orders for termination, adjudication and temporary legal custody should be reversed and C.A.D. III should be returned to the custody of J.K.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE MET THE STATUTORY CRITERIA TO TERMINATE MOTHER'S PARENTAL RIGHTS.

Before parental rights can be terminated, the State must present clear and convincing evidence that the parent failed to succeed at an appropriate, court-ordered treatment plan, and that the conduct or condition rendering the parent unfit is unlikely to change within a reasonable time. Mont. Code Ann. § 41-3-609 (1)(f) (2009). Thus, the district court must find both (1) noncompliance with an appropriate treatment plan, and (2) conduct or condition unlikely to change within a reasonable time. In *D.B.*, this Court provided specific guidance on the application of each prong. *In re D.B.*, ¶ 29. J.K.'s arguments are divided below accordingly.

A. The District Court Erred in Concluding That J.K.'s Treatment Plan Was Appropriate as it Failed to Consider Either J.K. or C.A.D. III's Specific Needs, Lacked Reasonable Timelines, and Was Impossible to Complete as Recommended Services Were Not Provided.

The State bears the burden of proving by clear and convincing evidence that a treatment plan is appropriate. *In the Matter of A.N. and C.N.*, 2000 MT 35, ¶ 24, 298 Mont. 237, 995 P.2d 427.

While there is no bright-line definition of an "appropriate" treatment plan, the Court has offered factors for consideration: (1) whether the parent was represented by counsel, (2) whether the parent stipulated to the plan, and

(3) whether the plan "takes into consideration the particular problems facing both the parent and the child." However, just because the parent both was represented by counsel and stipulated to the plan does not necessarily mean the plan was appropriate. The plan must still consider the specific needs of both the parent and the child. *In re D.B.*, ¶ 32. This is particularly important when a parent or child is disabled. In such circumstances, the plan must be customized, such as by requiring the parent receives one-on-one instruction tailored to her individual abilities. *In re D.B.*, ¶ 34. (citing *In re J.B.K.,* 2004 MT 202, ¶ 28, 322 Mont. 286, 95 P.3d 699). In fact, the Department has a duty to prove by clear and convincing evidence that the plan "either anticipated the disabled parent's of child's needs or was modified to address the special needs after they were diagnosed." *In re D.B.*, ¶ 35. Of course, even when there is no apparent disability, each treatment plan should still be consistent with the unique circumstances of each parent and child. *In re D.B.*, ¶ 32 (citing *In re A.N.*, ¶ 26).

In *In the Matter of M.M.*, 271 Mont. 52, 894 P.2d 298 (1995), it was clear that the Department had considered the unique needs of both M.M. and the father when devising and implementing the treatment plans. The first treatment plan, in October 1992, required the father to obtain a psychological evaluation, but as he failed to do so, the next treatment plan could not address his needs. *M.M.*, 271 Mont. at 54-55, 894 P.2d at 302. M.M. was evaluated in December 1992, and the

child psychologist testified about his reactive attachment disorder, post-traumatic stress disorder, mental retardation, fetal alcohol syndrome, and cleft palate discovered during the evaluation. *M.M.*, 271 Mont. at 55, 894 P.2d at 301. The Department then created a second treatment plan in June 1993, addressing M.M.'s needs and again ordering an evaluation for the father. After the father still was not evaluated, the Department filed a termination petition. *M.M.*, 271 Mont. at 55, 894 P.2d at 301. The father then argued on appeal that his treatment plan was inappropriate because it did not address his special needs. This Court disagreed, pointing to the testimony of several professionals who identified the father's specific mental health needs and spoke to their efforts to tailor their instructions in consideration of that. *M.M.*, 271 Mont. at 58-60, 894 P.2d at 302-03. Thus, it was clear that the treatment plans and the professionals working with the M.M. and his father did address their specific needs.

In *In re K.J.B*, ¶ 11, the Department requested that the parents undergo psychological evaluations *before* a plan was created so that the parents' unique needs could be addressed in the plan. In fact, the dispositional hearing was continued twice to allow the parents sufficient time to complete the evaluations. *In re K.J.B.*,¶ 12.

In determining the "appropriateness" of a treatment plan, the courts should also consider whether the plan contains reasonable timelines or deadlines. *In re*

D.B., ¶ 36. While each treatment plan is unique, many have long time periods, such six months, with multiple phases, each phase with specific goals or objectives. *In re D.B.*, ¶ 36. Alternately, many parents are given several different treatment plans, each addressing issues that may become apparent following completion of objectives in previous plans. See *In re A.N.*, ¶¶ 29, 40 (both parents had three treatment plans, the third altering the requirements based on the outcome of the first two); *In the Matter of Declaring J.W. and K.D.*, 2001 MT 86, ¶ 11, 305 Mont. 149, 23 P.3d 916 (two treatment plans, each containing four goals for the parent to achieve within six months); *In the Matter of A.A. and D.A.*, 2005 MT 119, ¶¶ 22-25, 327 Mont. 127, 112 P.3d 993 (four treatment plans, the first continuing ten months long, the second lasting seven months, the third approximately four months, and the fourth providing the mother roughly seven months before the termination hearing); *In the Matter of S.M.*, 1999 MT 36, ¶¶ 18-22, 293 Mont. 294, 975 P.2d 334 (four treatment plans, each approximately six months in duration).

Unlike the above cases, J.K.'s treatment plan was not appropriate because it did not consider her and her baby's specific needs, did not contain reasonable timelines, and was impossible to comply with as recommended services were never provided.

Objective number one of J.K.'s treatment plan required completion of a psychological evaluation and parenting assessment with Silverman. (2/5/10 Tr. at 9.) Objective number two provided that she "attend and participate in any therapy or education recommended" in those evaluations. (D.C. Doc. 59.) However, because Silverman's recommendations were not disseminated until June 2009, a month before the treatment plan expired, it was impossible for J.K. to comply with the second objective until it was too late. (2/5/10 Tr. at 38.)

In his report, Silverman recommended that J.K. should be instructed using a hands-on approach as she lacked insight and had trouble implementing new information. (2/5/10 Tr. at 33-34, 147.) He also noted her lack of education as being problematic. (2/5/10 Tr. at 39.) As J.K. did not complete high school, she struggled to understand complex subject matter, such as the four page long report he complied on her behalf. Therefore, she would need help understanding and implementing his recommendations.

Based on J.K.'s special needs, Silverman recommended admission into a "residential therapeutic environment for young mothers and their children," such as the Carol Graham Home in Missoula. (2/5/10 Tr. at 27.) The Carol Graham Home allows young mothers to live with their children in an environment that provides a great deal of training, monitoring, and support while they apply newly acquired parenting skills. (2/5/10 Tr. at 26-27.) Such a program would benefit J.K. because

while she could articulate parental values, she struggled to apply those concepts with C.A.D. III. (2/5/10 Tr. at 28.) Silverman noted that J.K. was not a lost cause and could improve "if she was in an environment where she was receiving hands-on coaching." (2/5/10 Tr. at 28.)

Despite Silverman's specific recommendation for J.K. to be admitted to a "residential therapeutic environment," the Department never offered this service. Leeper testified that he "didn't know" whether or not the Department informed J.K. about the Carol Graham Home. (2/5/10 Tr. at 159-62.) In fact, nobody at the Department or Family Concepts ever mentioned it to J.K. (2/5/10 Tr. at 208.) This is not surprising as they did not receive Dr. Silverman's report and recommendations until June 2009, a month before the treatment plan was to expire. (2/5/10 Tr. at 38.) Given that, it was impossible for J.K. to follow Silverman's recommendations and comply with objective two of the treatment plan. The first J.K. ever heard of the Carol Graham Home was in December 2009, from her addiction counselor. Upon learning of its existence, J.K. became excited and promptly began the application process with help from her counselor. (2/5/10 Tr. at 208.) Had Silverman's report been disseminated earlier, the Department may have offered the service. Or perhaps if, upon learning about the delay, the Department had offered a second treatment plan, J.K. could have applied for the

recommended placement at Carol Graham, and been in compliance with her treatment plan.

Instead of ensuring the recommended services were provided to J.K., Leeper guessed that they were. (2/5/10 Tr. at 162.) He testified that he assumed that if she was visiting her child at Family Concepts, then she must have been receiving hands-on training during her visits. (2/5/10 Tr. at 162.) She was not. J.K. testified that during her visits Hunter simply told her to apply what she learned in group parenting class. (2/5/10 Tr. at 211-12.) J.K. attempted to do so, but received little feedback from Hunter, the extent of which was to suggest puzzles or games to play with C.A.D. III. (2/5/10 Tr. at 211.) Thus, although J.K. was targeted as an individual requiring hands-on instruction due to difficulty with implementation, she was not so assisted. As a result, the plan failed to meet J.K.'s specific needs as required in *In re D.B.*

The Department's plan also failed to consider C.A.D. III's specific needs. It would have been impossible to do so since he was never evaluated. Silverman testified that during his one hour observation period of mother and child he witnessed C.A.D. III exhibit "highly unusual behaviors" including banging his head on the door upon separation from J.K. (2/5/10 Tr. at 24.) Silverman noted that such behaviors are usually associated with "severe autism or other kinds of neurological problems, [but] it can also occur with reactive attachment disorder."

(2/5/10 Tr. at 25.) C.A.D. III was eventually evaluated by a Department social worker, but not until the end of August 2009, after the treatment plan had expired and the Department was already poised to petition for termination. (2/5/10 Tr. at 41.) As the Department did not have any information about C.A.D. III's specific needs when the plan was created, there is no way the plan could have addressed those needs. Especially considering the possibility that C.A.D. III suffered a disability, the Department should have ordered an evaluation early and used the results in creating a treatment plan specific to him.

Overall, the treatment plan design itself necessarily prevented the plan from being customized for J.K. and C.A.D. III. As in *K.J.B.*, the Department could have required both J.K. and C.A.D. III to be evaluated *before* they created a treatment plan, such that the plan could be customized for their specific needs. *In re K.J.B*, ¶ 11. This was foreseeable by the Department as J.K. had presented early in 2008 as lacking parenting skills and C.A.D. III had also exhibited odd behaviors early on. (D.C. Doc. 41.) It is clear the existing treatment plan did not anticipate C.A.D. III.'s needs because those needs were not diagnosed until after the plan expired in August 2009. Equally evident is that upon discovery, the plan was not modified to consider those needs because by that time the plan had expired. No new plan was created. Instead, his mother's rights to parent him were terminated.

As in *In re A.A.*, the Department could have ordered multiple treatment plans to implement Dr. Silverman's recommendations for J.K. and the Department's later diagnosis for C.A.D. III. *In re A.A.*, ¶¶ 22-25. Multiple plans could have evolved with J.K. and C.A.D. III as they proceeded through treatment. Instead, the Department pushed all the requirements into one treatment plan--three months in duration--creating a situation that made it impossible for the plan to succeed.

Given the impossibility that the Department was aware of J.K. and C.A.D. III's specific needs prior to creating the treatment plan, the Department failed to prove by clear and convincing evidence that the plan "t[ook] into consideration the particular problems facing both the parent and the child." *In re D.B.*, ¶ 32. Given that this factor was not met paired with the impossibility of J.K. complying with a treatment plan that was designed to fail, the district court erred in finding J.K.'s treatment plan was appropriate.

B. The District Court Erred In Concluding There Was Sufficient Evidence That J.K.'s Conduct or Condition Was Unlikely to Change Within a Reasonable Time.

If the district court has correctly concluded the mother did not comply with her treatment plan, it must then find that "the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time." Mont. Code Ann. § 41-3-609(1)(f) (2009).

In making that determination, the Court *must* consider several factors in making that determination, including but not limited to the following:

> (a) Emotional illness, mental illness, or mental deficiency of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;
> (b) A history of violent behavior by the parent;
> (c) Excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care and provide for the child; and
> (d) Present judicially ordered long-term confinement of the parent.

Mont. Code Ann. § 41-3-609(2)(a)-(d).

The district court must *adequately* address *each* applicable statutory requirement before terminating an individual's parental rights and make "*specific* statutory findings required by § 41-3-609." *In re M.T.*, 2002 MT 174, ¶ 24, 310 Mont. 506, 51 P.3d 1141 (*citing In re E.K.*, 2001 MT 279, ¶ 32, 307 Mont. 328, 37 P.3d 690; *In re D.B.*, ¶ 23) (emphasis added).

Thus, the court must demonstrate that the State has met its burden of proving by clear and convincing evidence that the prerequisite statutory criteria for termination have been met. *In re E.K.*, ¶ 32 (*citing In re E.W.*, 1998 MT 135, ¶ 12, 289 Mont. 190, 959 P.2d 951 (citation omitted)).

In *M.T.*, the district court terminated the mother's rights to her five children after she failed four treatment plans over a period of more than two years. *In re M.T.*, ¶¶ 3-10, 28. Among the issues rendering the mother unfit was her

destructive and abusive relationship with her husband. *In re M.T.*, ¶¶ 12-16. At the termination hearing, the family therapist, who had spent over 200 hours with the family over two years, testified that it may take five to ten years for a victim of intergenerational domestic violence to substantially step outside the cycle and provide stability for her kids. *In re M.T.*, ¶ 14.

This Court commented on the district court's extensive findings supporting its conclusion that the conduct or condition rendering the mother unfit would not likely change within a reasonable time. *In re M.T.*, ¶¶ 33, 38. Specifically, this Court took note of the district court's reliance on the therapist's testimony that it would take five to ten years to correct the mother's conditions making her an unfit parent. *In re M.T.*, ¶¶ 33, 38.

In this case, there is no evidence to support the district court's conclusory statement that J.K's conduct or condition is unlikely to change within a reasonable time. (D.C. Doc. 105 at 4.) Unlike in *M.T.*, where the district court relied on a therapist's testimony that it may take a decade for the mother to change, this district court simply stated, "[b]ecause of the mother's failure to resolve the issues that caused the child to be adjudicated as a youth in need of care, the conduct and condition of the mother rendering her unfit is unlikely to change within a reasonable time." (D.C. Doc. 105 at 4.) The district court here did not address any of the above statutory criteria, except to note facts that led to the termination of the

birth father's parental rights. (D.C. Doc. 105 at 4.) The court did not point to a single fact that supported the contention that *J.K.* was unlikely to change within a reasonable time. This is likely because the record was completely devoid of such testimony. To the contrary, Silverman testified that J.K. was not a lost cause and could improve "if she was in an environment where she was receiving hands-on coaching." (2/5/10 Tr. at 28.)

Silverman presented the only testimony regarding J.K.'s condition. Unlike in *M.T.*, where the testifying therapist had spent more than 200 hours with the parent, Silverman spent approximately six to eight hours with J.K. (2/5/10 Tr. at 36.) Most notably, he did not testify that J.K. would be unable to change within a reasonable time. On the contrary, Silverman testified about J.K.'s immaturity and adolescence, characteristics that increase, rather than decrease, the likelihood her parenting will improve within a reasonable period of time. (2/5/10 Tr. at 17.)

J.K. was only given one chance in the form of one three-month long treatment plan that was designed to fail. In *M.T.*, the mother's rights were terminated only after having failed four treatment plans over a period of more than two years. *In re M.T.*, ¶¶ 3-10, 28. Instead of allowing the adolescent J.K. more time to complete the treatment plan she had clearly taken steps toward completing--including completing the chemical dependency evaluation, maintaining a sober

lifestyle, developing parenting skills, and applying for enrollment in the Carol Graham Home--the court summarily terminated her rights.

In doing so, however, the district court failed to address the statutory factors of Mont. Code Ann. § 41-3-609(2)(a)-(d) it is mandated to consider. First, the court made no findings about J.K.'s emotional or mental state that would render her unfit to parent. That is likely because there was no testimony that J.K. suffered emotional or mental illness or mental deficiency, with the exception of lack of education and youth. While Silverman recommended personal psychotherapy, he did not make any specific findings that J.K. suffered any kind of mental illness or deficiency. (2/5/10 Tr. at 25.) Instead, he offered that while her responses with regard to expectations to young children were appropriate, she seemed to lack insight into her son and overestimated his abilities. (2/5/10 Tr. at 20.)

The district court also did not address the second factor; a history of violent behavior by the parent. This is also likely because there is no evidence J.K. possesses any violent tendencies at all. In fact, there is evidence directly contrary. Silverman testified that J.K. tested in the "normal range" on the child abuse potential inventory, noting that he is not really concerned that J.K. will abuse her son. (2/5/10 Tr. at 46.) He remarked that her description of a time where she took C.A.D. III to his grandmother because she became overwhelmed was "actually quite impressive." (2/5/10 Tr. at 46.) Silverman's concern is possible neglect,

such as J.K. not monitoring the child or feeding him properly, and those are things that could have been addressed at the Carol Graham Home. (2/5/10 Tr. at 46-47.) J.K. could also have continued to acquire assistance from her very large family, who all love C.A.D. III and J.K. unconditionally. (2/5/10 Tr. at 235.)

Although there were allegations of domestic violence in the home, J.K. was the victim, not perpetrator of that violence. She cannot be held responsible for possible violence in the home as she herself was a victim of the alleged abuse. *See* Mont. Code Ann. § 41-3-102(23)(b) (providing that the term psychological abuse or neglect "may not be construed to hold a victim responsible for failing to prevent the crime against the victim").

The court did address the third factor; excessive use of alcohol or drugs that effect an ability to parent. However, the court did so in a way that mischaracterized the testimony. In its Findings of Fact Conclusions of Law, the district court noted that Theresa Oakland ("Oakland"), licensed addiction counselor, testified that J.K. was cannabis dependent and that her "recovery environment was not supportive of recovery as she continues to live with a chemically dependent significant other." (D.C. Doc. 105 at 3.) While Oakland did so testify, the tenor of her testimony was not as to J.K.'s failure, but rather her success with sobriety. (2/5/10 Tr. at 74-75.) She testified to J.K.'s remarkable progress, noting her consistent and "active participation" in the program,

acceptance of her substance use as a disease, consistently negative UA results, and sustained sobriety. (2/5/10 Tr. at 74-75.) At the time Oakland wrote her non-compliance report to the Department, her prognosis was not good, however, it improved considerably following the eight months of sobriety and her motivation in treatment. (2/5/10 Tr. at 75.) In fact, Oakland complimented J.K. on a "pretty big accomplishment considering her recovery environment is not supportive of her recovery"--a positive on her part. (2/5/10 Tr. at 76.) The fact that C.A.D. Jr. uses alcohol and marijuana should not overshadow J.K.'s sobriety, especially since the factor requires the court to consider whether J.K.'s substance abuse effects *her* ability to parent, not another's ability. At the time of the termination hearing, Oakland's testimony was that J.K. was sober. Her UA results reflect that conclusion. There was no testimony that J.K.'s ability to parent was affected by her alcohol or drug use.

The final factor--present judicially ordered long-term confinement of the parent--was not addressed by the district court because it is not applicable. There is no evidence that J.K. has ever even been in danger of being imprisoned or confined in any way.

There are simply no findings of any kind regarding the above statutory factors, just a conclusory statement that "the conduct and condition of the mother rendering her unfit is unlikely to change within a reasonable time." (D.C. Doc.

105 at 4.) This generic finding is exactly the concern voiced by Chief Justice Gray in her dissent in *In re K.J.B.*, ¶¶ 45-46, where she states:

> On this record, however, virtually no evidence supported the adjudication of the child as a youth in need of care and her placement in the State's custody. I have no quarrel with the District Court's ability to take judicial notice of the prior proceedings. That is a far cry, however, from permitting a trial court to avoid making findings of fact and conclusions of law adjudicating a child as a youth in need of care based on the present, rather than the past.
>
> In closing, I note only that we have repeatedly cautioned the State and district courts to strictly follow the statutes applicable to child abuse and neglect proceedings. See *In re A.R.*, 2004 MT 22, ¶ 23, 319 Mont. 340, 83 P.3d 1287; *Inquiry into M.M.*, 274 Mont. 166, 174, 906 P.2d 675, 680 (1995); *Matter of F.H.*, 266 Mont. 36, 40, 878 P.2d 890, 893 (1994); *Matter of R.B.*, 217 Mont. 99, 105, 703 P.2d 846, 849 (1985). We have done so, on occasion, to avoid reversing a trial court's decisions. *See e.g.*, *In re A.R.*, ¶ 23; *Inquiry into M.M.*, 274 Mont. at 173-74, 906 P.2d at 679-80. It is obvious that our cautions continue to fall on deaf ears. Apparently, the State and the trial courts simply do not care what the law is in Montana, as stated by this Court.

Absent any specific findings concerning continued abuse or neglect by J.K., the district court erred in its findings of fact since it did not address the statutory factors and, thus, did not establish substantial evidence to support its findings. The Department failed to prove by clear and convincing evidence that J.K.'s treatment plan addressed the specific needs of J.K. and C.A.D. III. Given that and that due to the Department's deficiency the plan that was impossible to complete, the district court erred in finding J.K.'s treatment plan was appropriate. As the plan was not

appropriate and the court failed to address the required statutory factors, the order terminating J.K.'s parental rights should be reversed.

CONCLUSION

The natural mother's rights were violated when C.A.D. III was removed from her care when no immediate or apparent danger existed. This event started a train in motion that proved impossible to stop. The district court erred in its denial of the motion to dismiss based upon the illegal removal. The findings of fact upon which it based its denial and the adjudication of C.A.D. III as a youth in need of care were insufficient and not supported by sufficient evidence in the record. Additionally, the district court erred in concluding the Department met the statutory criteria required to terminate parental rights. Given the district court's erroneous conclusions of law and insufficient factual findings, it abused its discretion in terminating J.K.'s parental rights. For these reasons, this action should be reversed and remanded to the district court with instructions that the case be dismissed and parental rights restored.

Respectfully submitted this ____ day of May, 2010.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

JOHNNA K. BAFFA

APPENDIX